

# THE STATE OF NEW HAMPSHIRE

## SUPREME COURT

**In Case No. 2004-0235, In the Matter of Michelle Momenee-DuPrie and James Momenee-DuPrie, the court on March 15, 2005, issued the following order:**

The respondent, James Momenee-DuPrie, appeals an order of the trial court denying his motion to reduce his temporary child support obligation. We vacate and remand.

We afford trial courts broad discretion in divorce matters. Rattee v. Rattee, 146 N.H. 44, 46 (2001). We will not disturb modification orders absent an unsustainable exercise of discretion. In the Matter of Jerome & Jerome, 150 N.H. 626, 628 (2004).

In March 2002, the trial court issued a temporary order of support that required the respondent to pay the petitioner child support in the amount of \$1615 per month. In April 2002, the respondent filed a motion for modification, asserting that he would become unemployed on April 25, 2002. The trial court denied the motion but authorized the respondent to use the parties' tax refund check to satisfy his child support obligation. In June 2002, the trial court denied the respondent's motion for reconsideration, stating that if the respondent did not become employed before the proceeds from the tax refund were depleted, he could renew his request for modification. In March 2003, the respondent's child support obligation was reduced to \$263 per month.

Child support is determined on the basis of present income. See In the Matter of Plaisted & Plaisted, 149 N.H. 522, 525 (2003); RSA ch. 458-C. While a trial court may adjust a child support award calculated under the child support guidelines if it finds special circumstances warrant deviation, see, e.g., RSA 458-C:5, I (2004); the special circumstances are based on income and expenses, not assets. See Plaisted, 149 N.H. at 525-26.

In its final decree of divorce, the trial court found that the tax refund was a marital asset and that each party had a 50% interest in it. The court also found that because the respondent had failed to make child support payments, the petitioner was authorized to deduct the child support payments from this asset. The court then credited the petitioner with the amount of child support paid from the tax refund, an amount in excess of 50%, and awarded her the balance of the funds left in the account.

Because it appears from the record that the trial court erred in denying the respondent's 2002 motion for modification, we vacate that portion of the parties' divorce decree that awarded the joint tax refund to the petitioner. We note that the award of the tax refund to petitioner appears based on the respondent's failure to pay any child support for at least one year. We therefore express no opinion on the appropriate division of this asset. We simply vacate and remand to allow the trial court to recalculate the respondent's child support obligation from April 2002 to March 2003 and to review the award of the tax refund in light of our ruling today.

Vacated and remanded.

DALIANIS, DUGGAN and GALWAY, JJ., concurred.

**Eileen Fox**  
**Clerk**